

STATE OF MICHIGAN
COURT OF APPEALS

BRIDGET TOLLIVER,

Plaintiff/Counter-Defendant-
Appellee,

v

STONEBROOK III DIVIDEND HOUSING
ASSOCIATION L.P. d/b/a STONEBROOK
TOWNHOMES AND STONEBROOK
APARTMENTS,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED

April 19, 2012

No. 303290

Kent Circuit Court

LC No. 10-001359-NZ

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Plaintiff/Counter-Defendant, Bridget Tolliver, appeals as of right from the trial court's order dismissing her complaint and entering a default judgment in favor of defendant/counter-plaintiff Stonebrook III Dividend Housing Association (Stonebrook). We affirm the trial court's grant of the motion to compel, vacate the order dismissing Tolliver's cause of action and granting default in favor of Stonebrook and remand for further proceedings.

For approximately 13 years, Tolliver was a resident of an apartment complex that Stonebrook owned and operated. Tolliver alleges that she discovered water damage in her apartment in the summer of 2009, that she complained to Stonebrook numerous times without effect and that she ultimately discovered black mold in the apartment. Tolliver further alleges that her and her family were forced to vacate the apartment when Stonebrook failed to take action to remove the mold. As a result, Tolliver filed a complaint seeking damages related to constructive eviction.

In response to Tolliver's complaint, Stonebrook filed its answer and a counter-complaint. In the answer, Stonebrook denied that it failed to remove the mold and fix the associated leak. Rather, it asserted that Tolliver continually denied it access to her apartment to remedy the condition. According to Stonebrook, Tolliver maintained control and possession of the apartment unit after she vacated it and the unit was armed with an active alarm that would be set off upon Stonebrook's entry. Further, Stonebrook alleged that plaintiff was intentionally

restricting Stonebrook's access in order to increase the growth of the mold. In the counter-complaint, Stonebrook sought damages for unpaid rent and for utilities bills that Tolliver had placed in Stonebrook's name. Stonebrook alleged counts of breach of contract, waste and intentional interference with business relations. Stonebrook also requested an injunction ordering Tolliver to grant it access to the unit to conduct an inspection and make any needed repairs.

After the parties commenced their respective actions, the trial court entered a scheduling order on July 20, 2010. Pursuant to the order, all discovery was to be completed by November 22, 2010, and all motions for summary disposition not purely based on the pleadings had to be filed by December 13, 2010. Further, the court ordered the parties to participate in alternative dispute resolution. The mediator's fee was to be divided equally between the parties.

On August 25, 2010, Stonebrook served Tolliver copies of its First Interrogatories and Request for Admissions. The copies were sent to Tolliver's attorney, D. Scott Stuart, by way of first class mail. In an e-mail, Stuart informed Tolliver that the response to the discovery requests were due by September 24, 2010. On September 2, 2010, Stuart filed a motion to withdraw as counsel. That motion was denied, on September 17, 2010 after a hearing on the merits. At the hearing, Stuart stated that Tolliver no longer wanted him to represent her. Tolliver stated that she did want to be represented by Stuart. In an October 11, 2010 letter from Stuart to Tolliver that is included in the lower court file, Stuart stated that Tolliver had been misleading him and withholding information. He further stated that Tolliver had failed to respond to his requests for assistance in responding to Stonebrook's discovery request. He noted that Tolliver had walked out on the court ordered mediation session and, prior to the hearing on the motion to withdraw as counsel, had repeatedly said she no longer wished to be represented by Stuart. Finally, Stuart asserted that he advised his client of the need to respond to the discovery requests and the likelihood of sanctions if she failed to do so.

Stonebrook filed a motion to compel on November 4, 2010. According to the register of actions, the trial court scheduled a hearing regarding the motion to compel for December 3, 2010. However, the trial court granted the motion to compel on November 8, 2010, before the scheduled hearing had occurred and before Tolliver responded to the motion and before his response was due pursuant to the court rules.¹ The court ordered Tolliver to respond to Stonebrook's interrogatories by November 17, 2010. The court stated that a failure to fully comply in a timely manner would result in the imposition of sanctions.

Tolliver, through her counsel, filed her response to the motion to compel on November 23, 2010, despite the fact that the trial court had already granted the motion. In the short

¹ Three days prior, the trial court held a hearing on a motion for summary disposition, which Stonebrook had filed pursuant to MCR 2.116(C)(8) and (C)(10). At the summary disposition hearing, Tolliver's failure to comply with the court's scheduling order was referenced, but the merits of the motion to compel were not addressed. This opinion does not describe Stonebrook's motion for summary disposition in detail because that motion was not ruled on prior to the court dismissing this case.

response, Tolliver stated that the motion was rendered moot by the trial court's order. According to the register of actions, the hearing that the court had scheduled regarding the motion to compel was held on December 3, 2010, but occurred in the trial court judge's chambers and was off the record. At the hearing, Stonebrook asked the trial court to dismiss Tolliver's case as a sanction for failing to comply with the scheduling order and the November 8, 2010 order granting the motion to compel. Stonebrook also requested a default judgment in its favor on its counter claim. The court apparently agreed to issue the requested orders. After the hearing, Stonebrook submitted a proposed order to dismiss Tolliver's case and grant default in favor of Stonebrook. Tolliver subsequently filed an objection to the proposed order and asked for a formal hearing to address whether sanctions and default were proper. The register of actions entry relating to Tolliver's objection to the order indicates that a hearing was to be held on the matter on January 7, 2011.

On December 15, 2010, after Stonebrook's request for default, Stuart once again filed a motion to withdraw as counsel. In his motion, Stuart presented evidence that Tolliver had filed a request for an investigation with the Attorney Grievance Commission prior to the hearing on Stuart's first motion to withdraw. Although the request for investigation was denied, Stuart asserted that there was damage to the attorney/client relationship and that he could not proceed as counsel. The court scheduled a January 7, 2011 hearing to address that motion.

Tolliver did not attend the January 7, 2011 hearing. Rather, she sent her father in her place. Tolliver's father stated that he was "speaking for her" as she was ill and could not attend.² He said that it was Tolliver's wish to be given a new attorney. When the hearing commenced, the trial court granted Stuart's motion to withdraw as counsel. Stuart confirmed that his legal aid organization would not provide Tolliver with another attorney and that stated that she would have to secure her own counsel if she desired to have new counsel. The trial court then addressed the propriety of dismissing Tolliver's cause of action as a sanction and granting default in favor of Stonebrook. Tolliver's father was apparently unaware of his ability to ask for an adjournment to allow his daughter to have new counsel argue the motion to dismiss. Therefore, without objection from Tolliver's father, the trial court stated "The motion to dismiss is granted for clear failure to comply with this court's orders, most specifically, the November 8 order. Also, default judgment will enter on the counterclaim."

Following the trial court's entry of an order dismissing Tolliver's claim and entering default in favor of Stonebrook, Tolliver filed a motion for reconsideration through newly obtained counsel. In the motion, Tolliver asserted that she had been sick and confined to a bed. She stated that Stuart had failed to notify her about the outstanding discovery requests. As a result of her illness and the allegedly deficient performance of her counsel, Tolliver stated that

² On appeal, Tolliver has stated that she was experiencing complications related to a pregnancy. Stonebrook contends that there was no indication below that Tolliver was pregnant. However, we note that the lower court file contains a letter from Tolliver to the trial court, in which she asserted that she was pregnant. Tolliver's letter was accompanied by a letter from her treating physician.

the dismissal of her case was an improper sanction considering that her conduct was not wanton or flagrant. In its response to Tolliver's motion, Stonebrook contested Tolliver's claim that she did not receive adequate representation. Rather, according to Stonebrook, Tolliver was aware of the outstanding discovery requests and simply failed to comply in a timely manner despite also being aware of the possibility of sanctions. The trial court denied the motion for reconsideration, and Tolliver now appeals as of right.

On appeal, Tolliver first asserts that the trial court erred in granting Stonebrook's motion to compel before the hearing that had been scheduled regarding that motion. We disagree. "This Court reviews rulings on motions to compel discovery for an abuse of discretion." *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005).

As this Court has explained, "[p]arties are permitted to obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the lawsuit, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party." *Cabrera*, 265 Mich App at 407. While the court rules promote a broad discovery policy, a trial court should ensure that a discovery request being opposed by a party is not "excessive, abusive or irrelevant." *Id.*

On appeal, Tolliver fails to provide any legal support for the notion that the trial court was required to hold the scheduled hearing prior to granting Stonebrook's motion to compel. However, the court rule does provide for the opportunity for the party opposing a written motion to file a written response. MCR 2.119(C)(4). The court may shorten that time at its discretion. MCR 2.119(C)(4). Tolliver fails to explain how the lack of a hearing was consequential. She offers this Court no reason to believe that the motion to compel would have been denied had she been provided with an opportunity to be heard. Tolliver's prior attorney, in his response to the motion that was filed after the court's issuance of the Order to Compel, merely asserted mootness and appeared to understand that he had no viable argument to offer in opposition to the discovery requests even if he had filed answer before the ruling. Tolliver's failure to object to the initial entry of the order, when combined with her attorney's apparent recognition of the propriety of the order, is tantamount to a waiver. There is no allegation that the interrogatories at issue were excessive, abusive or irrelevant. Further, there is no tangible evidence that Tolliver was unaware of the court's original scheduling order or the original deadline associated with the interrogatories. As a result, we cannot find that the trial court abused its discretion in granting Stonebrook's motion to compel.

Next, Tolliver argues that the trial court erred in dismissing her case as a sanction for failure to comply with the court's discovery orders. We conclude that the record does not adequately demonstrate that the trial court conducted the requisite analysis before issuing its order. This Court reviews the imposition of a discovery sanction for an abuse of discretion. *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994). The abuse of discretion standard recognizes that a trial court should not be reversed unless its decision fell outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

"Because the imposition of sanctions is discretionary, the trial court should carefully consider the circumstances of the case to determine whether a drastic sanction, such as dismissing a claim, is appropriate." *Richardson v Ryder Truck Rental, Inc.*, 213 Mich App 447,

451; 540 NW2d 696 (1995). Further, “because default is a severe sanction, it is imperative that the trial court balance the factors and explain its reasons for imposing such a grave sanction in order to allow for meaningful appellate review. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75; 618 NW2d 66 (2000). “The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it.” *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled on alternative grounds by *Dimmitt & Owens Financial, Inc v Deloitte & Touche, LLC*, 481 Mich 618, 624; 752 NW2d 37 (2008).

At Stonebrook’s request, the trial court dismissed Tolliver’s cause of action and granted default judgment on Stonebrook’s counter-claim. At the January 7, 2011 hearing, the trial court stated that the motion was granted “for clear failure to comply with the Court’s orders, most specifically, the November 8th order.” The court did not provide any further detail regarding the reasoning for its decision and the transcript does not demonstrate that the trial court carefully considered all of the factors and circumstances when determining if the requested sanctions were proper. The court effectuated its holding in a written order, which also stated that Tolliver had failed to comply with the court’s discovery orders, but did not demonstrate that the trial court considered the factors and circumstances and considered all of its options prior to sanctioning Tolliver. Likewise, the court’s order denying Tolliver’s motion for reconsideration does not assist us in determining whether the trial court engaged in the requisite analysis before reaching its conclusion. It remains possible that the trial court did expound on its reasoning at the December 3, 2010 hearing, at which the notion of sanctions was first raised. However, because that hearing was not transcribed, we do not have any knowledge of what occurred.

Because our case law explicitly requires evidence that the trial court considered all of the available options and balanced the specific factors and circumstances of the case at issue, we vacate the trial court’s order dismissing Tolliver’s complaint and granting Stonebrook default. On remand, the trial court is directed to further explain its ruling and to detail why this “drastic sanction” was proper. Our holding should not be interpreted as an indication that we believe dismissal and default are necessarily improper in this case. Further, because we have vacated the order at issue, it is not necessary for this Court to address whether it was improper for the trial court to rule on this motion when Tolliver did not have the benefit of representation or whether the trial court erred in failing to conduct a trial on damages.

Affirmed in part, vacated in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens